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IN THE
COURT OF APPEALS OF INDIANA

COPY SERVICES, INC. d/b/a THE COPY SHOP and COPY WRIGHT, INC. d/b/a THE COPY SHOP,	)	
Appellants-Defendants-Counterclaimants,	)	
vs.	)	No. 71A03-0606-CV-271
UNIVERSITY OF NOTRE DAME DU LAC,	)	
Appellee-Plaintiff-Counterdefendant.	)	

APPEAL FROM THE ST. JOSEPH CIRCUIT COURT
The Honorable Michael G. Gotsch, Judge
The Honorable David T. Ready, Magistrate Judge
Cause No. 71C01-0508-PL-252

February 23, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Copy Services, Inc. ("Copy Services"), doing business as The Copy Shop, and Copy Wright, Inc. ("Copy Wright"), also doing business as The Copy Shop (sometimes collectively referred to as "the Shop"), bring this interlocutory appeal challenging the grant of the partial summary judgment motion filed by the University of Notre Dame Du Lac ("the University"). We affirm.

Issue

The Shop raises four issues, which we consolidate and restate as whether the trial court erred in granting the University's partial summary judgment motion.

Facts and Procedural History

The facts most favorable to the Shop are as follows. On July 1, 1998, Copy Services and the University executed a lease agreement ("the Lease"). Pursuant to the Lease, Copy Services, as Lessee, would lease Rooms 018 and 019 in the LaFortune Student Center ("the Premises") from the University, as Lessor, to operate a copy shop for an initial term of three years. The rent was based on a percentage of annual gross sales and a monthly utility fee of $1000. The Lease permitted Copy Services, with the consent of the University, to assign its interests under the Lease and also included the following relevant clauses:

> 3. RENEWAL OPTION. Subject to the LESSEE not being in default under the terms and conditions of this LEASE, the LESSEE shall have the right and option to renew and extend the initial term of this lease for successive additional periods of one (1) year commencing with the expiration of the initial lease term by giving written notice to that effect to LESSOR not later than sixty (60) days prior to the expiration of the initial lease term. Any amendment or modification so agreed upon shall be in writing and signed by both LESSOR and LESSEE.
>
> ….

7. … LESSOR represents that the use of the premises by LESSEE as a copy shop is a permitted use under the zoning classification and laws and ordinances applicable to the premises.

….

9. ALTERATIONS. All such additions, alterations and improvements to the demised Premises will be made at a mutually agreeable time and at the sole expense and risk of the LESSEE. Plans and specifications must be approved by the LESSOR before the initiation of any work.

….

LESSEE will not place or cause to be placed or maintained on or about the Premises, any sign, advertising matter or other thing of any kind and will not place or maintain any decoration, lettering or advertising matter on the glass of any window or door of the Premises without first obtaining LESSOR's written approval. The LESSEE will maintain the neon sign that reads "The Copy Shop" which is presently on the wall outside Room 018.

All additions, alterations and improvements made by LESSEE will become the property of LESSOR upon the expiration or termination of this Lease; provided however, that LESSOR may, at its option, require LESSEE to remove, at its cost and expense, any such additions, alterations and improvements at the end of the Lease term or any renewal thereof.

10. MAINTENANCE AND REPAIR.

(a) LESSOR, at its sole expense, shall maintain in good condition and repair the exterior portion of the Premises including the roof, foundation, structural components, public areas, except for reasonable wear and tear, and except for such repairs as may be required by reason of the acts, misuse or neglect of the LESSEE, its employees, agents, invitees, licensees or contractors, and except as otherwise provided in this Lease. LESSOR shall also maintain the heating and ventilating systems, the life support systems (fire extinguisher, alarms and sprinklers) and the lighting system including bulbs.

….

(d) LESSEE shall be responsible for maintaining the Premises in as good condition as they are and keeping them in a clean, orderly and sanitary condition, free of insects, rodents, vermin, and other pests and in compliance with all applicable laws, rules and regulations of the LaFortune Student Center and any governmental authority having jurisdiction over the Premises.

….

19. SURRENDER OF PREMISES. Upon the expiration of this Lease, any extension thereof, or its termination in any way, LESSEE shall surrender and deliver up the Premises broom clean and in as good order and condition as the same shall have been at the commencement of the initial term of this Lease, or shall have been put by LESSEE and/or LESSOR, reasonable wear and tear excepted ….

Appellants' App. at 14-20.

On August 31, 2001, Copy Services sold some assets to Copy Wright, and Copy Wright subleased the Premises from Copy Services. The sublease limited the use of the Premises, stating, "The Premises shall be used solely for operating the Copy Shop and for no other purpose." *Id*. at 136. The sublease was subject and subordinate to all terms and conditions contained in the Lease and incorporated the terms, covenants, and conditions contained in the Lease. The initial term of the sublease commenced October 1, 2001, and ended September 30, 2002, and the sublease was renewable to the same extent as the Lease.

Each year between 2000 and 2004, Copy Services provided written notice to the University of its intent to exercise the right and option to renew the Lease. On January 10, 2005, Copy Services again sent the University written notice of its desire to renew the Lease. On March 1, 2005, the University informed Copy Services, in writing, that it had decided not to accept the offer to renew the Lease and would allow the Lease to terminate upon the expiration date of the current term, June 30, 2005. Failing to receive an acknowledgement from Copy Services, the University provided additional written correspondence to Copy Services on June 7, 2005, indicating that the University expected the Copy Shop to vacate the Premises by June 30, 2005, and that the University would institute eviction proceedings if Copy Services failed to do so.

On August 26, 2005, the University filed a complaint against the Shop for, inter alia, ejectment and application for immediate possession of real property. On September 21, 2005, a hearing was held on the application for immediate possession, which the trial court denied. On November 17, 2005, the University filed an amended complaint and a motion for

partial summary judgment seeking a determination that the Lease is not perpetual and terminates as a matter of law on or before June 30, 2006. On March 7, 2006, a hearing was held on the University's summary judgment motion, and the trial court granted the motion on April 10, 2006. The Shop brings this interlocutory appeal.

Discussion and Decision

The Shop appeals the trial court's granting of the University's summary judgment motion. Our standard of review is well settled:

> Summary judgment is appropriate only when there are no genuine issues of material fact and the moving party is entitled to a judgment as a matter of law. Ind. Trial Rule 56(C). In reviewing a trial court's ruling on summary judgment, this court stands in the shoes of the trial court, applying the same standards in deciding whether to affirm or reverse summary judgment. Thus, on appeal, we must determine whether there is a genuine issue of material fact and whether the trial court has correctly applied the law. In doing so, we consider all of the designated evidence in the light most favorable to the non-moving party. The party appealing the grant of summary judgment has the burden of persuading this court that the trial court's ruling was improper.

Perryman v. Motorist Mut. Ins. Co., 846 N.E.2d 683, 687 (Ind. Ct. App. 2006) (some citations omitted). Specific findings of fact and conclusions of law are neither required nor prohibited in the summary judgment context. *City of Gary v. Ind. Bell Tel. Co.*, 732 N.E.2d 149, 153 (Ind. 2000). Such findings aid our review of a summary judgment, but they are not binding on this Court. *Id*.

Broadly stated, the Shop asserts that the trial court erred in determining that the Lease was not a perpetual lease. More specifically, the Shop makes four arguments in support of its position: (1) the Lease unambiguously establishes that the parties intended for the Shop to have the right to renew the Lease forever; (2) the Lease is ambiguous as to whether it is

perpetual, and therefore extrinsic evidence is admissible to resolve the ambiguity; (3) the Lease must be reviewed in terms of public policy; and (4) a genuine issue exists as to whether the University is estopped from asserting that the Lease is not perpetual. We address each argument in turn.

The Shop first contends that the lease, within its four corners, unambiguously establishes the parties' intent to enter into a perpetual lease. The construction of a written contract is a question of law for which summary judgment is particularly appropriate. *Smyrniotis v. Marshall*, 744 N.E.2d 532, 534 (Ind. Ct. App. 2001). We construe a lease in the same manner as any other contract. *Id*. Indiana follows the four corners rule, namely, that extrinsic evidence is not admissible to add to, vary, or explain the terms of a written instrument if the terms of the instrument are susceptible of a clear and unambiguous construction. *Univ. of So. Ind. Found. v. Baker*, 843 N.E.2d 528, 532 (Ind. 2006) (quotation marks omitted). A document is not ambiguous simply because parties disagree about a term's meaning. *Id*. Language is ambiguous only if reasonable people could come to different conclusions as to its meaning. *Id*.

The University asserts that the Lease is not a perpetual lease, citing *Geyer v. Lietzan*, 230 Ind. 404, 103 N.E.2d 199 (1952) and *Smyrniotis*, 744 N.E.2d 532. In *Geyer*, our supreme court began its analysis of the lease at issue there with the following observation:

> The law does not favor perpetual leases. *A lease will not be construed as conferring a right to perpetual renewals unless it clearly so provides, in language so plain and unequivocal as to leave no doubt that such was the intention and purpose of the parties.* A lease will, if possible, be so construed as to avoid a perpetuity by renewal.
>
> In construing a lease for the purpose of ascertaining the intention of the parties, the court will, if possible, give effect to all its parts. The entire

> instrument will be considered and *its meaning will be determined from a consideration of all its provisions taken together as a whole*. All clauses, terms and provisions must be considered in connection with the rest of the lease.

Geyer, 230 Ind. at 408-09, 103 N.E.2d at 200-01 (citations omitted) (emphases added).

The renewal option in *Geyer* provided,

> the lessee shall, at his option, be entitled to the right and privilege of renewing this lease with and under all the terms and conditions thereof, successively, providing that said lessee shall, at least thirty (30) days before the expiration of any two year period of this lease, or any successive renewals thereof, give written notice of his intention so to renew to the lessors; and that upon the 3rd or any subsequent renewal the lessors may, at their option, increase the annual rental over and above the rent herein reserved of Six Hundred ($600.00) Dollars per year in the sum of Sixty ($60.00) Dollars per year for any two year period thereafter.

Id. at 409, 103 N.E.2d at 201 (quotation marks omitted). Initially, the *Geyer* court recognized that the option, read in isolation, "would be strongly indicative of an intention to confer upon the lessee the right to renew the lease indefinitely." *Id*., 103 N.E.2d at 201. However, the supreme court concluded that the option could not be interpreted to allow the lessee the right to renew the lease forever and without end, noting that the lease did not use words such as "forever", "for all time", "in perpetuity", etc., which would ordinarily be used to create a perpetual lease. *Id*., 103 N.E.2d at 201. The *Geyer* court also stated that, though the option provided for "successive renewals", the word successive imported "concatenation",[1] not duration. *Id*. at 410, 103 N.E.2d at 201.[2]

[1] Concatenation means "to link together in a series or chain." Merriam-Webster, http://m-w.com/dictionary/concatenation (last visited Jan. 16, 2007).

The *Geyer* court then turned to an examination of the lease as a whole and concluded that it contained provisions that were inconsistent with a lease that might last for centuries. These provisions included: (1) the requirement that the premises be returned in as good condition as they were at the commencement of the lease; (2) the restriction as to the use of the premises; (3) the requirement that the payment of rentals be made to the lessors or the duly authorized agent, identified by name; (4) a fixed rent for the first three years, which could be increased by $60.00 per year for any two-year period thereafter; and (5) the renewal clause was limited to the lessee only, *in contrast* to the initial term, which included the lessee's heirs, assigns, executors, and administrators. *Id*. at 410-12, 103 N.E.2d at 201-2. The supreme court then stated, "We conclude, from an examination and consideration of all the provisions of the lease contract, that it does not so clearly provide for perpetual renewals as to leave no doubt that such was the purpose and intention of the parties." *Id*. at 411, 103 N.E.2d at 202.

In *Smyrniotis*, another panel of this Court concluded that the trial court had not erred in finding, pursuant to *Geyer*, that the lease at issue was not a perpetual lease. In reaching this conclusion, the *Smyrniotis* court made the following observations: (1) the lease did not provide for any increase in rent; (2) the lease required the landlord to maintain the roof and pay for any repairs to the furnace, water heater, and structure; (3) the lease purported to provide only Smyrniotis the right to renew the lease; and (4) the lease did not contain the

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[2] The Shop apparently disagrees with the *Geyer* court's statement regarding the meaning of "successive." Appellants' Reply Br. at 12-13. "Successive" is defined as "following in order: following each other without interruption." Merriam-Webster, http://m-w.com/dictionary/successive (last visited Jan. 9, 2007). We agree with the *Geyer* court that "successive" does not speak to duration.

words "forever", "for all time", "in perpetuity", etc., or otherwise provide an express indication that the lease provided for renewals in perpetuity. 744 N.E.2d at 535.

The Shop first asserts that the renewal option here is materially the same as the option in *Geyer*. Based on this assertion, the Shop then contends that the renewal option is "'strongly indicative of an intention to confer upon the lessee the right to renew the lease indefinitely.'" Appellants' Br. at 15 (quoting *Geyer*, 230 Ind. at 409, 103 N.E.2d at 201). The Shop also asserts, "*Geyer* finessed the unequivocal language of the option … by identifying five other provisions within the lease that it found to be inconsistent with a perpetual leasehold." *Id*. at 16.

The Shop's argument is fatally flawed for two reasons. First, we disagree that the renewal option is as similar to the option in *Geyer* as the Shop asserts. There is a significant difference in the language of the two options that requires the lessee to provide written notice of intent to renew. The renewal option here requires that the Lessee give written notice "no later than sixty (60) days prior to the expiration of the initial Lease term." Appellant's App. at 14. In contrast, the renewal option in *Geyer* required the lessee to provide written notice "at least thirty (30) days before the expiration of any two year period of the lease, *or any successive renewals thereof*." 230 Ind. at 409, 103 N.E.2d at 201. Thus, while the renewal option in *Geyer* anticipates more than one renewal, the same cannot be said of the language in the renewal option before us now.

Second, the Shop completely disregards the fact that the *Geyer* court concluded that the renewal option there did not contain the usual language that would indicate the parties' intent to enter into a perpetual lease, such as "forever", "for all time", or "in perpetuity", or

any other language that would indicate, unambiguously, that the parties intended for the lessee to have the right to renew indefinitely, and therefore the option could not be interpreted to allow a perpetual renewal. *See id*. at 409, 103 N.E.2d at 201.

Given that the renewal option here does not include words such as "forever", "for all time", or "in perpetuity", we conclude that the renewal option should not be construed to confer upon the Lessee the right to renew the Lease forever. Moreover, our examination of the Lease as a whole reveals that it includes provisions that are inconsistent with a perpetual lease. The Lease requires Lessee to return the Premises "broom clean and in as good order and condition as the same shall have been at the commencement of the initial term[.]" Appellants' App. at 20. This provision is "appropriate in short term leases," but is "totally inconsistent with the idea that the parties had in mind a term which might last several centuries." *See Geyer*, 230 Ind. at 410, 103 N.E.2d at 201.[3] The Lease also requires that Lessee maintain "the Premises in as good condition as they are and keeping them in a clean, orderly and sanitary condition[.]" Appellants' App. at 17. Further, the Lease requires the University to maintain the exterior portion of the Premises, including the roof, foundation, structural components, and the heating and ventilating systems, life support systems, and the lighting system including bulbs. A provision of this type is "particularly unlikely to be included in a lease in perpetuity." *See Smyrniotis*, 744 N.E.2d at 535. Additionally, the Lease requires the Lessee to pay $1000 a month for utilities and fails to provide any

[3] The Shop argues that this provision is not inconsistent with a lease that is continually renewable, citing *Pope v. Lee*, 879 A.2d 735 (N.H. 2005). However, the Lease provides that it shall be governed by Indiana law. Appellants' App. at 22. We are bound by the precedent set by our supreme court. *Jurich v. John Crane, Inc.*, 824 N.E.2d 777, 784 (Ind. Ct. App. 2005).

mechanism for this payment to be increased as utility costs rise. This provision is inconsistent with an intent to provide perpetual renewals. *See id*. (stating that absence of provision permitting rent increase is inconsistent with perpetual lease).

Another provision that is inconsistent with a lease in perpetuity is the requirement that Lessee maintain the neon sign that reads, "The Copy Shop." Appellants' App. at 16. While there is no provision in the Lease that requires the Premises to be used solely as a copy shop,[4] the sign requirement is indicative of the parties' understanding that the Premises would be used only as a copy shop. The requirement that the Premises be limited to use only as a copy shop is inconsistent with a perpetual lease because it would tie up the rooms forever for one particular and narrow use. *Geyer*, 230 Ind. at 410, 103 N.E.2d at 201. We find the Shop's argument that the University will always need a copy shop unpersuasive, especially in light of rapidly changing technology.

We acknowledge, as the Shop declares, that not all the provisions that were significant in *Geyer* are present in the Lease here. That does not persuade us, however, that *Geyer* is inapplicable. We observe that the lease in *Smyrniotis* did not contain all the provisions that were included in the *Geyer* lease, and we nevertheless concluded that the trial court did not err in finding that the lease was not perpetual. The salient point in both cases was this: the lease at issue did not contain unequivocal language such as "forever", "for all time", or "in perpetuity", and the lease contained provisions that were inconsistent with a perpetual lease, and therefore, considered as a whole, the lease could not be construed to provide infinite renewals. We think the same is true of the Lease here.

The Shop's attempts to suggest that there are some provisions that indicate that the parties intended to create a perpetual lease are unavailing, simply because those provisions are of the type normally included in commercial leases for space in a larger building.[5] Further, we are unpersauded by the Shop's argument that because the Lessor here is a University, rather than a person, *Geyer* and *Smyrniotis* are distinguishable. While it may be true that a University has the potential to exist long after the lifespan of a human being, that fact does not negate the short-term character of some of the provisions in the Lease. Finally, we disagree with the Shop that *Geyer* is inapplicable because the Shop has exercised its option to renew the Lease a number of times. We do not think that the fact the Shop and the University have agreed to past renewals invalidates the method of analysis employed by the *Geyer* court to determine whether a lease, within in its four corners, indicates that the parties agreed to a lease in perpetuity. Our examination and consideration of all the provisions of the Lease lead us to the conclusion that "it does not so clearly provide for perpetual renewals as to leave no doubt that such was the purpose and intention of the parties." *See id*. at 411, 103 N.E.2d at 202.

The Shop next asserts, "If Within its Four Corners the Lease Did Not Establish the Parties Intent to Enter a Continually Renewable Lease, Extrinsic Evidence [is] Necessary to Clear Up [the] Ambiguity." Appellants' App. at 23. We disagree. Pursuant to the principle that the law does not favor perpetuities, the supreme court set forth the standard with which a

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[4] There is a requirement in the sublease that limits the use of the Premises as a copy shop.

[5] For example, the Lease provides that all additions, alterations, and improvements will be made at the sole expense and risk of the Lessee. Appellants' App. at 16. Such requirements are typical in commercial leases.

lease must comply before it may be construed as a perpetual lease: "A lease will not be construed as conferring a right to perpetual renewals unless it clearly so provides, in language so plain and unequivocal as to leave no doubt that such was the intention and purpose of the parties." *Geyer*, 230 Ind. at 408; 103 N.E.2d at 200. Simply put, if a lease meets this standard, it will be construed as a perpetual lease. If it does not, it will not be construed as providing a right to perpetual renewals. Here, the Lease has not met the *Geyer* test, and therefore we may not construe it as a perpetual lease. The analysis is complete, and there is no further necessity of addressing a question of ambiguity as to this issue. Accordingly, extrinsic evidence is inadmissible.

The Shop also argues that the trial court erred in failing to consider whether the Lease contravenes public policy using the factors set forth in *Fresh Cut, Inc. v. Fazli*, 650 N.E.2d 1126 (Ind. 1995). The Shop's argument is multi-layered, but its basic presumption is faulty. The Shop states, "*Geyer* held that, because Indiana public policy disfavors perpetuities, a successive-renewal option is *unenforceable as against public policy* unless the parties clearly and unequivocally intended the lease to be continually renewable." Appellants' App. at 29 (emphasis added). Significantly, however, the *Geyer* court did *not* state that perpetual leases were unenforceable as against public policy. Rather, the *Geyer* court recognized a different concept, namely, that "[t]he law does not favor perpetual leases." 230 Ind. at 408, 103 N.E.2d at 200. "The fact that perpetual leases are disfavored *does not mean* that they are contrary to public policy, and where the intent is clear, a court will not interpret a valid perpetual lease provision merely to relieve a party of a bad bargain." 49 AM. JUR. 2D, *Landlord and Tenant* § 142 (2006) (emphases added). In other words, Indiana courts will

enforce a perpetual lease where the intent of the parties to create such a lease is unequivocal. In contrast, contractual agreements that contravene the public policy of Indiana are void and unenforceable. *Straub v. B.M.T. by Todd*, 645 N.E.2d 597, 598-99 (Ind. 1994). Our supreme court has noted that where an agreement violates public policy, no contract is created. *Id*. at 599.[6] We therefore reject the Shop's assertion that perpetual leases are unenforceable as against public policy. Accordingly, the public policy analysis in *Fresh Cut* is inapplicable.[7]

The Shop further contends that a genuine issue of material fact exists as to whether the University is equitably estopped from asserting that the renewal option is perpetual.[8] Equitable estoppel is available if one party, through its representatives or course of conduct, knowingly misleads or induces another party to believe and act upon its conduct in good faith and without knowledge of the facts. *Amer. Family Mut. Ins. Co. v. Ginther*, 803 N.E.2d 224, 234 (Ind. Ct. App. 2004). The requirements for equitable estoppel are: (1) a representation or concealment of material facts; (2) made with knowledge, actual or constructive, of the facts and with the intention that the other party act upon it; (3) made to a party ignorant of the

[6] For example, one well-established public policy of this State is protecting the welfare of children. As a consequence of this public policy, agreements between parents giving up a child's right to support are void. *See Straub*, 645 N.E.2d at 599-600 ("Any agreement purporting to contract away [a child's right to child support] is directly contrary to this State's public policy of protecting the welfare of children, as it narrows the basis for support to one parent.").

[7] We also note that *Smyrniotis* was decided six years after *Fresh Cut*, and the *Smyrniotis* court based its decision upon *Geyer* without reference to *Fresh Cut*.

facts; and (4) which induces the other party to rely or act upon it to his detriment. *Id*. The party claiming estoppel has the burden to show all facts necessary to establish it. *Story Bed & Breakfast, LLP v. Brown County Area Plan Comm'n*, 819 N.E.2d 55, 67 (Ind. 2004).

The Shop argues that the University's acceptances of its multiple renewals establish a genuine issue of material fact as to whether the University knowingly misrepresented its construction of the Lease. The University contends that its acceptances of renewals do not constitute representations that the Lease would be perpetual. We agree with the University. The University's acceptance of renewals is not inconsistent with their position that they also had the right to reject the Shop's request for renewal. Thus, the fact that the University accepted the Shop's renewals of the Lease for several years does not establish that the University believed that the Lease provided for perpetual renewals. *See Smyrniotis*, 744 N.E.2d at 532 n.2 (rejecting lessee's argument that lessor ratified belief that lease was perpetual by continuing to accept payments after initial term of lease).[9] We therefore affirm the ruling of the trial court.

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[8] The University asserts that the Shop waived this argument because it failed to raise it as an affirmative defense pursuant to Indiana Trial Rule 8(C). However, where the opposing party both had notice and failed to make an objection before the trial court, then that party will have impliedly consented to the non-pleaded issue. *Mercantile Nat'l Bank of Ind. v. First Builders of Ind., Inc.*, 774 N.E.2d 488, 492-93 (Ind. 2002); Ind. Trial Rule 15(C). Here, the Shop raised equitable estoppel in its memorandum in opposition to motion for partial summary judgment filed on January 27, 2006, and raised equitable estoppel before the trial court at the summary judgment hearing on March 7, 2006. The University both had notice and failed to object at the summary judgment hearing. Therefore, the Shop has not waived its equitable estoppel argument.

Affirmed.

SULLIVAN, J., and SHARPNACK, J., concur.

[9] In its reply brief, the Shop asserts for the first time that a party's performance "under a contract can lead to estoppel without resort to the elements for equitable estoppel." Appellants' Reply Br. at 19. Appellants are not permitted to present new arguments in their reply briefs, and any argument an appellant fails to raise in his initial brief is waived for appeal. *See Felsher v. Univ. of Evansville*, 755 N.E.2d 589, 593 n.6 (Ind. 2001); *see also* Ind. Appellate Rule 46(C) ("No new issues shall be raised in the reply brief."). Moreover, the Shop did not make this estoppel argument before the trial court. A party may not raise an issue the first time on appeal. *McBride v. Monroe County Office of Family & Children*, 798 N.E.2d 185, 194 (Ind. Ct. App. 2003).